

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF SOUTH CAROLINA  
COLUMBIA DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

MONSANTO COMPANY, T&T  
TECHNOLOGIES, INC., AND  
THERM-O-DISC, INC.,

Defendants

CIVIL ACTION NO:  
3:92-0961-19

CONSENT DECREE

I. BACKGROUND

A. The United States of America ("United States"), on behalf of the Administrator of the United States Environmental Protection Agency ("EPA"), filed a complaint in this matter pursuant to Section 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9607.

B. The United States in its complaint seeks, inter alia: (1) reimbursement of Past and Future costs incurred by EPA and the Department of Justice for response actions at the SCRDI-Dixiana Superfund Site located in the City of Cayce, Lexington County, South Carolina, together with accrued interest; and (2) response work by the Settling Defendants, including but not limited to, performance of Operation and Maintenance ("O&M") of

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the remedy at the Site consistent with the National Contingency Plan, 40 C.F.R. Part 300 (as amended) ("NCP").

C. In accordance with the NCP and Section 121(f)(1)(F) of CERCLA, 42 U.S.C. § 9621(f)(1)(F), EPA notified the State of South Carolina (the "State") on January 12, 1995, of negotiations with the Settling Defendants regarding the implementation of the operation and maintenance of the remedy at the Site, and EPA has provided the State with an opportunity to participate in such negotiations and to be a party to this Consent Decree.

D. The Settling Defendants that have entered into this Consent Decree ("Settling Defendants") do not admit any liability to the Plaintiff arising out of the transactions or occurrences alleged in the complaint.

E. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, by publication in the Federal Register at 48 Fed. Reg. 40658.

F. In response to a release or a substantial threat of a release of hazardous substances at or from the Site, EPA commenced in May, 1984, a Remedial Investigation and Feasibility Study ("RI/FS") for the Site pursuant to 40 C.F.R. § 300.430;

G. EPA completed a Remedial Investigation ("RI") Report and a Feasibility Study ("FS") Report in May, 1986;

H. Pursuant to Section 117 of CERCLA, 42 U.S.C. § 9617, EPA published notice of the completion of the FS and of the proposed plan for remedial action on July 29, 1986, in a major local

newspaper of general circulation. EPA provided an opportunity for written and oral comments from the public on the proposed plan for remedial action. A copy of the transcript of the public meeting is available to the public as part of the administrative record upon which the Regional Administrator based the selection of the response action.

I. The decision by EPA on the remedial action to be implemented at the Site is embodied in a final Record of Decision ("ROD"), executed on September 26, 1986 on which the State had a reasonable opportunity to review and comment/on which the State has given its concurrence. The ROD includes an Explanation of Significant Differences ("ESD") issued by EPA on July 10, 1991, which explains the differences between the final plan and the proposed plan. The ROD also includes a Responsiveness Summary to the public comments. Notice of the final plan was published in accordance with Section 117(b) of CERCLA.

J. Based on the information presently available, EPA believes that the Work will be properly and promptly conducted by the Settling Defendants if conducted in accordance with the requirements of this Consent Decree and its appendices.

K. Solely for the purposes of Section 113(j) of CERCLA, the Remedial Action selected by the ROD and the Work to be performed by the Settling Defendants shall constitute a response action taken or ordered by the President.

L. The Parties recognize, and the Court by entering this Consent Decree finds, that this Consent Decree has been

negotiated by the Parties in good faith and implementation of this Consent Decree will expedite the cleanup of the Site and will avoid prolonged and complicated litigation between the Parties, and that this Consent Decree is fair, reasonable, and in the public interest.

NOW, THEREFORE, it is hereby Ordered, Adjudged, and Decreed:

## II. JURISDICTION

1. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1345, and 42 U.S.C. §§ 9606, 9607, and 9613(b). This Court also has personal jurisdiction over the Settling Defendants. Solely for the purposes of this Consent Decree and the underlying complaints, the Settling Defendants waive all objections and defenses that they may have to jurisdiction of the Court or to venue in this District. The Settling Defendants shall not challenge the terms of this Consent Decree or this Court's jurisdiction to enter and enforce this Consent Decree.

## III. PARTIES BOUND

2. This Consent Decree applies to and is binding upon the United States and upon the Settling Defendants and their successors and assigns. Any change in ownership or corporate status of a Settling Defendant including, but not limited to, any transfer of assets or real or personal property shall in no way alter such Settling Defendant's responsibilities under this Consent Decree.

3. The Settling Defendants shall provide a copy of this Consent Decree to each contractor hired to perform the Work (as defined below) required by this Consent Decree and to each person representing any Settling Defendant with respect to the Site or the Work and shall condition all contracts entered into hereunder upon performance of the Work in conformity with the terms of this Consent Decree. The Settling Defendants or their contractors shall provide written notice of the Consent Decree to all subcontractors hired to perform any portion of the Work required by this Consent Decree. The Settling Defendants shall nonetheless be responsible for ensuring that their contractors and subcontractors perform the Work contemplated herein in accordance with this Consent Decree. With regard to the activities undertaken pursuant to this Consent Decree, each contractor and subcontractor shall be deemed to be in a contractual relationship with the Settling Defendants within the meaning of Section 107(b)(3) of CERCLA, 42 U.S.C. § 9607(b)(3).

#### IV. DEFINITIONS

4. Unless otherwise expressly provided herein, terms used in this Consent Decree which are defined in CERCLA or in regulations promulgated under CERCLA shall have the meaning assigned to them in CERCLA or in such regulations. Whenever terms listed below are used in this Consent Decree or in the appendices attached hereto and incorporated hereunder, the following definitions shall apply:

"CERCLA" shall mean the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended, 42 U.S.C. §§ 9601 et seq.

"Consent Decree" shall mean this Decree and all appendices attached hereto (listed in Section XXX). In the event of conflict between this Decree and any appendix, this Decree shall control.

"Day" shall mean a calendar day unless expressly stated to be a working day. "Working day" shall mean a day other than a Saturday, Sunday, or Federal holiday. In computing any period of time under this Consent Decree, where the last day would fall on a Saturday, Sunday, or Federal holiday, the period shall run until the close of business of the next working day.

"EPA" shall mean the United States Environmental Protection Agency and any successor departments or agencies of the United States.

"Explanation of Significant Differences" or "ESD" shall mean the EPA document signed on July 10, 1991, by the Regional Administrator, EPA Region IV including attachments thereto. The ESD is attached hereto as Appendix E.

"Future Response Costs" shall mean all costs, incurred after August 31, 1994, including, but not limited to, direct and indirect costs, that the United States incurs in reviewing or developing plans, reports and other items pursuant to this Consent Decree, verifying the Work, or otherwise implementing, overseeing, or enforcing this Consent Decree, including, but not

limited to, payroll costs, contractor costs, travel costs, laboratory costs, the costs incurred pursuant to Sections VII, VIII, X (including, but not limited to, attorneys fees and the amount of just compensation), and XVI. Future Response Costs shall also include costs incurred by the United States in litigating this action as a plaintiff and negotiating the Administrative Order executed on February 15, 1995, and this Decree. Future Response Costs shall also include all costs, including direct and indirect costs, paid by the United States in connection with the Site, between August 31, 1994, and the effective date of this Consent Decree and all interest on the Past Response Costs that has accrued during the period from August 31, 1994, to the effective date of this Consent Decree.

"Hazardous Substance" shall mean any substance meeting the definition provided in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14).

"National Contingency Plan" or "NCP" shall mean the National Oil and Hazardous Substances Pollution Contingency Plan promulgated pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, codified at 40 C.F.R. Part 300, including, but not limited to, any amendments thereto.

"Operation and Maintenance" or "O&M" shall mean all O&M activities required by the ROD, the SOW attached hereto as Appendices A and B respectively, and incorporated herein by reference, and the O&M Plan and Manual ("O&M Plan") to be developed by Settling Defendants and approved by EPA pursuant to

this Consent Decree, including any additional O&M activities relevant to Sections VIII (EPA Periodic Review), VII (Additional Response Actions), and XVI (Emergency Response) XI (Reporting Requirements).

"O&M Design Plan" shall mean the Technical Memorandum and System Optimization Report to be developed by the Settling Defendants pursuant to the SOW and approved by EPA.

"O&M Implementation Plan" shall mean the PSVM Plan and O&M Plan and manual to be developed by the Settling Defendants pursuant to the SOW and approved by EPA.

"Paragraph" shall mean a portion of this Consent Decree identified by an arabic numeral or an upper case letter.

"Parties" shall mean the United States and the Settling Defendants.

"Past Response Costs" shall mean all costs, including, but not limited to, direct and indirect costs that the United States incurred and paid with regard to the Site prior to August 31, 1994, plus any interest which has accrued on these costs prior to that date.

"Performance Standards" shall mean those cleanup levels, treatment standards, standards of control, and other substantive requirements, criteria or limitations, identified in the ROD, (pages 17-18, and Table 4), the ESD, the SOW, including all plans, performance schedules and reports to be submitted in connection therewith, or as may be established by EPA pursuant to

Section 121(d)(4), 42 U.S.C. § 9621(d)(4) in the event that the chosen remedy is found to be technically impracticable.

"Performance Standards Verification Monitoring" or "PSVM" shall mean all performance monitoring activities required by the SOW attached hereto, and the PSVM Plan developed by Settling Defendants and approved by EPA, including any additional PSVM activities relevant to Sections VIII (EPA Periodic Review), VII (Additional Response Actions), XVI (Emergency Response), and XI (Reporting Requirements), to ensure the effectiveness of the implemented remedy and to confirm over time that all Performance Standards are met.

"Plaintiff" shall mean the United States.

"RCRA" shall mean the Solid Waste Disposal Act, as amended, 42 U.S.C. §§ 6901 et seq. (also known as the Resource Conservation and Recovery Act).

"Record of Decision" or "ROD" shall mean the EPA Record of Decision relating to the Site signed on September 26, 1986, by the Regional Administrator, EPA Region IV, and all attachments thereto.

"Remedial Action" shall mean those activities to be conducted pursuant to Section VII of this Consent Decree (Additional Response Actions).

"Section" shall mean a portion of this Consent Decree identified by a roman numeral.

"Settling Defendants" shall mean those Parties identified in Appendix D (Non-Owner Settling Defendants).

"Site" or "Dixiana Site" or "SCRDI/Dixiana Superfund Site" shall include the SCRDI-Dixiana two (2) acre facility located in Cayce, Lexington County, South Carolina, at Ballard Court, near U.S. 321, 2.1 miles south of U.S. Interstate 26, at 33 54'13" north latitude and 81 3' 47" west longitude, as generally depicted on the map attached hereto as Appendix C ("the Site facility"), and all areas contaminated by hazardous substances which have migrated at and from the Site, and all areas in close proximity to such contamination that are necessary for implementation of the Work under this Consent Decree.

"State" shall mean the State of South Carolina.

"Statement of Work" or "SOW" shall mean the document entitled Statement Of Work for implementation of the O&M, and PSVM at the Site, and any modifications made in accordance with this Consent Decree. The SOW is attached hereto as Appendix B and is incorporated into this Consent Decree.

"Supervising Contractor" shall mean the principal contractor retained by the Settling Defendants to supervise and direct the implementation of the Work under this Consent Decree.

"System Optimization Report" shall mean the document submitted by the Settling Defendants and approved by EPA, which documents all work performed pursuant to the approved Technical Memorandum and includes as-built drawings for the enhanced system.

"Technical Memorandum" shall mean the document submitted by the Settling Defendants and approved by EPA, which shall

include the procedures, general plan of action, schedule for implementation of the Supplemental Site Investigation recommendations and recommendations made in the Transition Plan, previously submitted to EPA.

"United States" shall mean the United States of America, including the Department of Justice and EPA.

"Validated" shall mean the process of evaluating the available data against the project data quality objectives ("DQOs") to make sure that the objectives are met, and thereby, ensure that all data be scientifically valid, defensible, and of known precision and accuracy.

"Waste Material" shall mean (1) any "hazardous substance" under Section 101(14) of CERCLA, 42 U.S.C. § 9601(14); (2) any pollutant or contaminant under Section 101(33), 42 U.S.C. § 9601(33); and (3) any "solid waste" under Section 1004(27) of RCRA, 42 U.S.C. § 6903(27). A material should not be considered a "waste material" to the extent that the subject waste is otherwise properly disposed of by municipal landfill disposal.

"Work" shall mean all activities the Settling Defendants are required to perform under this Consent Decree, including O&M, the tasks identified in the ROD, the PSVM Plan, additional response action(s) required pursuant to Section VII, and the SOW, including any schedules or plans required to be submitted pursuant thereto, except those required by Section XXVI (Retention of Records).

V. GENERAL PROVISIONS5. Objectives of the Parties

The objectives of the Parties in entering into this Consent Decree are to protect public health or welfare or the environment at the Site by the design and implementation of response actions at the Site by the Settling Defendants and to reimburse Past and Future response costs of the Plaintiffs as defined herein.

6. Commitments by Settling Defendants

a. The Settling Defendants shall finance and perform the Work in accordance with this Consent Decree and all plans, standards, specifications, and schedules set forth in or developed and approved by EPA pursuant to this Consent Decree. The Settling Defendants shall also reimburse the United States for Past Response Costs and Future Response Costs as provided in this Consent Decree.

b. The obligations of the Settling Defendants to finance and perform the Work and to pay amounts owed the United States under this Consent Decree are joint and several. In the event of the insolvency or other failure of any one or more the Settling Defendants to implement the requirements of this Consent Decree, the remaining the Settling Defendants shall complete all such requirements.

7. Compliance With Applicable Law

All activities undertaken by the Settling Defendants pursuant to this Consent Decree shall be performed in accordance

with the requirements of all applicable federal and state laws and regulations. The Settling Defendants must also comply with all applicable or relevant and appropriate requirements of all Federal and state environmental laws as set forth in the ROD and the SOW. The activities conducted pursuant to this Consent Decree, if approved by EPA, shall be considered to be consistent with the NCP.

8. Permits

a. As provided in Section 121(e) of CERCLA and §300.5 of the NCP, no permit shall be required for any portion of the Work conducted entirely on-site. To the extent that federal permit(s) is/are required to implement the remedy, the Remedial Project Manager "RPM" will consult with the issuing entity in an effort to expedite the issuance thereof. Permitting requirements hereunder shall comport with the guidelines set forth in the SOW relating to substance and form for any such applications and relating to the method of reviewing such applications (such as face to face meetings as set forth in the SOW). EPA does not object to the modification of the state permits in accordance with the provisions of the SOW.

b. The Settling Defendants may seek relief under the provisions of Section XIX (Force Majeure) of this Consent Decree for any delay in the performance of the Work resulting from a failure to obtain, or a delay in obtaining, any permit required for the Work, provided they have submitted all required information in a timely manner.

c. This Consent Decree is not, and shall not be construed to be, a permit issued pursuant to any federal or state statute or regulation.

VI. PERFORMANCE OF THE WORK BY SETTLING DEFENDANTS

9. Selection of Supervising Contractor.

a. Appendix B to this Consent Decree is the SOW which sets forth the major tasks that must be completed by Settling Defendants to implement the Work at the Site. The SOW is incorporated into this Consent Decree by reference as if fully set forth herein and is therefore both a requirement and an enforceable part of this Consent Decree.

b. EPA has approved Soil and Materials Engineering, Inc., as the Supervising Contractor as of the date this Consent Decree is issued.

c. If at any time thereafter, the Settling Defendants propose to use a different Supervising Contractor for Work at the Site, the Settling Defendants shall notify EPA and shall obtain an authorization to proceed from EPA before a new Supervising Contractor performs any Work under this Consent Decree. Any change in the Supervising Contractor made pursuant to this paragraph, shall not excuse any Work, deadlines, or schedules required under this Consent Decree.

10. O&M Design and Implementation Plans

a. The tasks that the Settling Defendants must complete and the deliverables associated with each task to support the Work are described in the SOW. EPA approval of a task or

deliverable shall not be construed as a guarantee of the ultimate adequacy of such a task or deliverable.

b. The Settling Defendants shall submit to EPA and the State a Technical Memorandum, a System Optimization Report, an O&M Plan and Manual, and PSVM Plan. These deliverables and all plans and reports to be submitted as part of these deliverables shall provide for implementation of the Work in accordance with the SOW and, upon their approval by EPA, shall be incorporated into and become enforceable under this Consent Decree.

c. The specific scope of the Work shall be documented by the Settling Defendants in a Technical Memorandum to be developed pursuant to the SOW and which shall provide the schedule for implementation of the Supplemental Site Investigation Report recommendations including equipment enhancement, establishing revised operating parameters, and which shall document any need for additional data along with the proposed Data Quality Objectives. The Supplemental Site Investigation Report is located in the Information Repository, located at EPA, Region 4, 345 Courtland Street, N.E., Atlanta, GA 30365, and the R.H. Smith Library, 1006-12th Street, Cayce, SC 29033.

d. The Settling Defendants shall also submit a System Optimization Report which shall document the implementation of the requirements of the Technical Memorandum.

e. The Settling Defendants shall also submit an O&M Plan and Manual which shall set forth the requirements for O&M at the Site including a Field Sampling and Analysis Plan, a PSVM Plan, a

Quality Assurance Project Plan, a Health and Safety Plan, a Sludge Management Plan, and a Best Management Practices Plan. The purpose of O&M is to operate, maintain, and monitor the performance of the selected remedy to ensure protection of human health and the environment.

f. The Settling Defendants shall also submit a PSVM Plan to ensure that site objectives are being met and to provide a mechanism to confirm that both short-term and long-term performance standards are met.

g. Upon approval of the Technical Memorandum, and after a reasonable opportunity for review and comment by the State, the Settling Defendants shall implement the provisions of the Technical Memorandum. The Settling Defendants shall not commence Work at the Site prior to approval of the Technical Memorandum.

h. The Settling Defendants shall submit to EPA and implement all plans, submittal(s) and other deliverables required under the SOW in accordance with the Compliance Schedule attached to the SOW.

#### 11. Performance Standards

The Work performed by the Settling Defendants pursuant to this Consent Decree shall include the obligation to achieve the Performance Standards in the ROD as set forth in the SOW and the Technical Memorandum, or as may be established by EPA pursuant to Section 121(d)(4) of CERCLA, 42 U.S.C. § 9621(d)(4), as it may be amended by EPA based upon a determination of technical impracticability.

12. Warranties

The Settling Defendants acknowledge and agree that nothing in this Consent Decree, the ROD, the SOW, the ESD, the PSVM Plan or Technical Memorandum constitutes a warranty or representation of any kind by Plaintiff that compliance with the work requirements set forth in the SOW and the Work Plans will achieve the Performance Standards.

13. Notification of Off-Site Waste Shipment

a. All waste materials removed from the Site shall be disposed of or treated at a facility approved by the EPA Project Coordinator and in accordance with Section 121(d)(3) of CERCLA, 42 U.S.C. § 9621(d)(3), with the U.S. EPA "Off-Site Policy," 40 CFR § 300.440 (50 Fed. Reg. 49200, September 22, 1993), and with all other applicable Federal, State and local requirements. The Settling Defendants shall, prior to any off-Site shipment of hazardous substances from the Site to an off-Site waste management facility, provide written notification to the appropriate state environmental official in the receiving state and to the EPA Project Coordinator, of such shipment of hazardous substances. However, the notification of shipments shall not apply to any off-Site shipments when the total volume of all shipments from the Site to the State will not exceed ten (10) cubic yards.

b. The notification shall be in writing, and shall include the following information, where available: (a) the name and location of the facility to which the hazardous substances

are to be shipped; (b) the type and quantity of the hazardous substances to be shipped; (c) the expected schedule for the shipment of the hazardous substances; and (d) the method of transportation. The Settling Defendants shall notify the receiving state of major changes in the shipment plan, such as a decision to ship the hazardous substances to another facility within the same state, or to a facility in another state.

c. The identity of the receiving facility and state will be determined by the Settling Defendants. The Settling Defendants shall provide all relevant information on the off-site shipments as soon as practicable after the award of the contract and before the hazardous substances are actually shipped.

14. Notwithstanding any action by EPA, the Settling Defendants remain fully responsible for compliance with the SOW and the Technical Memorandum. The Settling Defendants' compliance with the Work requirements shall not foreclose Plaintiff from seeking compliance with all terms and conditions of this Consent Decree, including, but not limited to, the applicable Performance Standards.

#### VII. ADDITIONAL RESPONSE ACTIONS

15. In the event that EPA determines or the Settling Defendants propose that additional response actions are necessary to meet the Performance Standards or to carry out the remedy selected in the ROD and ESD, notification of such additional response actions shall be provided to the Project Coordinator for the other party(ies).

16. Within 30 days of receipt of notice from EPA or the Settling Defendants pursuant to Paragraph 15 that additional response actions are necessary (or such longer time as may be specified by EPA), the Settling Defendants shall submit for approval by EPA, after reasonable opportunity for review and comment by the State, a work plan for the additional response actions. The plan shall conform to the applicable requirements of Paragraphs 10 and 11 of this Decree, the SOW, the Technical Memorandum, and Section IX (Quality Assurance Sampling and Data Analysis). Upon approval by EPA, the Additional Response Action Plan shall be incorporated into this Consent Decree as a requirement of this Order and shall be an enforceable part of this Order as if fully set forth herein. Upon approval of the plan pursuant to Section XII (Submissions Requiring Agency Approval), the Settling Defendants shall implement the plan for additional response actions in accordance with the schedule contained therein.

17. Any additional response actions that the Settling Defendants propose are necessary to meet the Performance Standards or to carry out the remedy selected in the ROD, and the ESD, shall be subject to approval by EPA, after reasonable opportunity for review and comment by the State, and, if authorized by EPA, shall be completed by the Settling Defendants in accordance with plans, specifications, and schedules approved or established by EPA pursuant to Section XII (Submissions Requiring Agency Approval).

18. The Settling Defendants may invoke the procedures set forth in Section XX (Dispute Resolution) to dispute EPA's determination that additional response actions are necessary to meet the Performance Standards or to carry out the remedy selected in the ROD. Such a dispute shall be resolved pursuant to Paragraphs 62-65 of this Consent Decree.

#### VIII. EPA OVERSIGHT AND PERIODIC REVIEW

19. Under Section 121(c) of CERCLA, 42 U.S.C. § 9621(c), and any applicable regulations, EPA may conduct a review of the Site to assure that the Work performed pursuant to this Decree adequately protects human health and the environment. EPA shall conduct onsite oversight of the Settling Defendants' activities throughout the performance of the Work. The EPA oversight team shall consist of the EPA RPM and the SCDHEC Project Manager. If the RPM is unavailable for any of the activities contemplated by this paragraph, EPA may substitute the RPM with another representative. While it is not anticipated that non-government affiliated outside contractor support will be necessary, EPA reserves the right to utilize contractors providing limited technical support and particularized expertise as determined by EPA for its activities. Further, EPA reserves the right to utilize government affiliated, in-house contractors providing limited technical support and particularized expertise for its activities. The Settling Defendants shall assist EPA in conducting oversight activities.

20. The Settling Defendants shall conduct any studies and investigations as requested by EPA in order to permit EPA to conduct reviews at least every five years as required by Section 121(c) of CERCLA and any applicable regulations.

21. The Settling Defendants and, if required by Sections 113(k)(2) or 117 of CERCLA, the public will be provided with an opportunity to comment on any further response actions proposed by EPA as a result of the review conducted pursuant to Section 121(c) of CERCLA and to submit written comments for the record during the public comment period. After the period for submission of written comments is closed, the Regional Administrator, EPA Region IV, or his/her delegate will determine in writing whether further response actions are appropriate.

22. If the Regional Administrator, EPA Region IV, or his/her delegate determines that information received, in whole or in part, during the review conducted pursuant to Section 121(c) of CERCLA, indicates that the Remedial Action is not protective of human health and the environment, the Settling Defendants shall undertake any further response actions EPA has determined are appropriate to carry out the remedy selected in the ROD. The Settling Defendants shall submit a plan for such work to EPA for approval in accordance with the procedures set forth in Section VII ("Additional Response Actions") and shall implement the plan approved by EPA.

IX. QUALITY ASSURANCE, SAMPLING, and DATA ANALYSIS

23. The Settling Defendants shall use quality assurance, quality control, and chain of custody procedures for all compliance and monitoring samples in accordance with EPA's "Region IV Environmental Compliance Branch Standard Operating Procedures and Quality Assurance Manual" (US EPA Region IV Environmental Services Division, February 1, 1991); "Interim Guidelines and Specifications For Preparing Quality Assurance Project Plans," December 1980, (QAMS-005/80); "Data Quality Objective Guidance," (EPA/540/G87/003 and 004); "EPA NEIC Policies and Procedures Manual," May 1978, revised November 1984, (EPA 330/9-78-001-R); and subsequent amendments to such guidelines upon notification by EPA to the Settling Defendants of such amendment. Amended guidelines shall apply only to procedures conducted after such notification. Prior to the commencement of any monitoring project under this Consent Decree, the Settling Defendants shall submit to EPA for approval, after a reasonable opportunity for review and comment by the State, a Quality Assurance Project Plan ("QAPP") that is consistent with the SOW, the NCP and applicable guidance documents. If relevant to the proceeding, the Parties agree that validated sampling data generated in accordance with the QAPP(s) and reviewed and approved by EPA shall be admissible as evidence, without objection, in any proceeding under this Decree. The Settling Defendants shall ensure that EPA personnel and its authorized representatives are allowed access at reasonable times

to all laboratories utilized by the Settling Defendants in implementing this Consent Decree. In addition, the Settling Defendants shall ensure that such laboratories shall analyze all samples submitted by EPA pursuant to the QAPP for quality assurance monitoring. The Settling Defendants shall ensure that the laboratories they utilize for the analysis of samples taken pursuant to this Decree perform all analyses according to accepted EPA methods. Accepted EPA methods may require, where needed for EPA periodic review pursuant to Section VIII hereof or for other significant events, those methods which are documented in the "Contract Lab Program Statement of Work for Inorganic Analysis" and the "Contract Lab Program Statement of Work for Organic Analysis," dated February 1988, and any amendments made thereto during the course of the implementation of this Decree. The Settling Defendants shall ensure that all laboratories they use for analysis of samples taken pursuant to this Consent Decree participate in an EPA or EPA equivalent QA/QC program.

24. Upon request, the Settling Defendants shall allow split or duplicate samples to be taken by EPA or its authorized representatives. The Settling Defendants shall notify EPA not less than 21 days in advance of any sample collection activity unless shorter notice is agreed to by EPA. In addition, EPA shall have the right to take any additional samples that EPA deems necessary. Upon request, EPA shall allow the Settling Defendants to take split or duplicate samples of any samples it

takes as part of the Plaintiff's oversight of the Settling Defendant's implementation of the Work.

25. The Settling Defendants shall submit to EPA two (2) copies of the results of all validated sampling and/or tests or other data obtained or generated by or on behalf of the Settling Defendants with respect to the Site and/or the implementation of this Consent Decree unless EPA agrees otherwise.

26. Notwithstanding any provision of this Consent Decree, the United States hereby retains all of its information gathering and inspection authorities and rights, including enforcement actions related thereto, under CERCLA, RCRA and any other applicable statutes or regulations.

#### X. ACCESS

27. Commencing upon the date of lodging of this Consent Decree, the Settling Defendants agree to provide the United States and its representatives, including EPA and its contractors, access at all reasonable times to the Site and any other property to which access is required for the implementation of this Consent Decree, to the extent access to the property is controlled by the Settling Defendants, for the purposes of conducting any activity related to this Consent Decree including, but not limited to:

- a. Monitoring the Work;
- b. Verifying any data or information submitted to the United States;

c. Conducting investigations relating to contamination at or near the Site;

d. Obtaining samples;

e. Assessing the need for, planning, or implementing additional response actions at or near the Site;

f. Inspecting and copying records, operating logs, contracts, or other documents maintained or generated by the Settling Defendants or their agents, consistent with Section XXV; and

g. Assessing the Settling Defendants' compliance with this Consent Decree.

The Settling Defendants shall provide EPA with an on-site office and adequate facilities for EPA use in conducting oversight activities.

28. To the extent that the Site or any other property to which access is required for the implementation of this Consent Decree is owned or controlled by persons other than the Settling Defendants, the Settling Defendants shall use best efforts to secure from such persons access for the Settling Defendants, as well as for the United States and the State and their representatives, including, but not limited to, their contractors, as necessary to effectuate this Consent Decree. For purposes of this Paragraph "best efforts" includes the payment of reasonable sums of money in consideration of access. If any access required to complete the Work is not obtained within 45 days of the date of lodging of this Consent Decree, or within 45

days of the date EPA notifies the Settling Defendants in writing that additional access beyond that previously secured is necessary, the Settling Defendants shall promptly notify the United States, and shall include in that notification a summary of the steps the Settling Defendants have taken to attempt to obtain access. The United States may, as it deems appropriate, assist the Settling Defendants in obtaining access. The Settling Defendants shall reimburse the United States, in accordance with the procedures in Section XVII (Reimbursement of Response Costs), for all costs incurred by the United States in obtaining access.

29. Notwithstanding any provision of this Consent Decree, the United States retains all of its access authorities and rights, including enforcement authorities related thereto, under CERCLA, RCRA and any other applicable statute or regulations.

#### XI. REPORTING REQUIREMENTS

30. In addition to any other requirement of this Consent Decree, the Settling Defendants shall submit, except as specifically requested, to EPA two (2) copies of written periodic progress reports submitted in accordance with the compliance schedule at page 16 of the SOW. Those reports shall:

- (a) describe the actions which have been taken toward achieving compliance with this Consent Decree during the previous period;
- (b) include a summary of all results of sampling and tests and all other data received or generated by the Settling Defendants or their contractors or agents in the previous period;

(c) identify all work plans, plans and other deliverables required by this Consent Decree completed and submitted during the previous period; (d) describe all actions, including, but not limited to, data collection and implementation of work plans, which are scheduled for the next twelve (12) weeks and provide other information relating to the progress of construction, including, but not limited to, critical path diagrams, Gantt charts and Pert charts; (e) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of the Work, and a description of efforts made to mitigate those delays or anticipated delays; (f) include any modifications to the work plans or other schedules that the Settling Defendants have proposed to EPA or that have been approved by EPA; and (g) describe all activities undertaken in support of the Community Relations Plan during the previous quarter and those to be undertaken in the next twelve (12) weeks. The Settling Defendants shall submit these progress reports to EPA pursuant to this paragraph until EPA notifies the Settling Defendants pursuant to Paragraph 48 of Section XV (Certification of Completion). If requested by EPA, the Settling Defendants shall also provide briefings for EPA to discuss the progress of the Work.

31. The Settling Defendants shall notify EPA of any change in the schedule described in the periodic progress report for the performance of any activity, including, but not limited to, data

collection and implementation of work plans, no later than seven days prior to the performance of the activity.

32. Upon the occurrence of any event during performance of the Work that the Settling Defendants are required to report pursuant to Section 103 of CERCLA or Section 304 of the Emergency Planning and Community Right-to-know Act (EPCRA), the Settling Defendants shall within 24 hours of the on-set of such event orally notify the EPA Project Coordinator or the Alternate EPA Project Coordinator (in the event of the unavailability of the EPA Project Coordinator), or, in the event that neither the EPA Project Coordinator or Alternate EPA Project Coordinator is available, the EPA Region IV Hotline at (404) 347-4062. These reporting requirements are in addition to the reporting required by CERCLA Section 103 or EPCRA Section 304.

33. Within 20 days of the onset of such an event, the Settling Defendants shall furnish to Plaintiffs a written report, signed by the Settling Defendant's Project Coordinator, setting forth the events which occurred and the measures taken, and to be taken, in response thereto. Within 30 days of the conclusion of such an event, the Settling Defendants shall submit a report setting forth all actions taken in response thereto.

34. The Settling Defendants shall submit 1 copy of all plans, reports, and data required by the SOW, PSVM Plan, or any other approved plans to EPA in accordance with the schedules set forth in such plans. The Settling Defendants shall simultaneously submit 1 copy of all such plans, reports and data to the State.

35. All reports and other documents submitted by the Settling Defendants to EPA (other than the periodic progress reports referred to above) which purport to document the Settling Defendants' compliance with the terms of this Consent Decree shall be signed by an authorized representative of the Settling Defendants

XII. SUBMISSIONS REQUIRING AGENCY APPROVAL

36. After review of any plan, report or other item which is required to be submitted for approval pursuant to this Consent Decree, EPA, after reasonable opportunity for review and comment by the State, shall: (a) approve, in whole or in part, the submission; (b) approve the submission upon specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, directing that the Settling Defendants modify the submission; or (e) any combination of the above. EPA shall consult with the Settling Defendants prior to the modification of any submission.

37. In the event of approval, or approval upon conditions or modification by EPA, pursuant to Paragraph 36(a) or (b), or (c) the Settling Defendants shall proceed to take any action required by the plan, report, or other item, as approved or modified by EPA subject only to their right to invoke the Dispute Resolution procedures set forth in Section XX (Dispute Resolution) with respect to the modifications or conditions made by EPA. In the event that EPA modifies the submission, in consultation with the Settling Defendants, to cure the deficiencies pursuant to

Paragraph 36(c) and the submission has a material defect, EPA retains its right to seek stipulated penalties, as provided in Section XXI.

38. a. Upon receipt of a notice of disapproval pursuant to Paragraph 36(d), Settling Defendants shall, within 21 days or such other time as specified by EPA in such notice, correct the deficiencies and resubmit the plan, report, or other item for approval. Any stipulated penalties applicable to the submission, as provided in Section XXI, shall accrue during the 21-day period or otherwise specified period but shall not be payable unless the resubmission is disapproved or modified due to a material defect as provided in Paragraph 40.

b. Notwithstanding the receipt of a notice of disapproval pursuant to Paragraph 36(d), Settling Defendants shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Settling Defendants of any liability for stipulated penalties due to a deficient portion under Section XXI (Stipulated Penalties).

39. In the event that a resubmitted plan, report or other item, or portion thereof, is disapproved by EPA, EPA may again require the Settling Defendants to correct the deficiencies, in accordance with the preceding Paragraphs. EPA also retains the right to amend or develop the plan, report or other item in consultation with the Settling Defendants, and the Settling Defendants shall implement any such plan, report, or item as

amended or developed by EPA, subject only to their right to invoke the procedures set forth in Section XX (Dispute Resolution).

40. If upon resubmission, a plan, report, or item is disapproved or modified by EPA due to a material defect previously identified by EPA and not corrected, Settling Defendants shall be deemed to have failed to submit such plan, report, or item timely and adequately unless the Settling Defendants invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution) and EPA's action is overturned pursuant to that Section. The provisions of Section XX (Dispute Resolution) and Section XXI (Stipulated Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XXI.

41. All plans, reports, and other items required to be submitted to EPA under this Consent Decree shall, upon approval or modification by EPA, be enforceable under this Consent Decree. In the event EPA approves or modifies a portion of a plan, report, or other item required to be submitted to EPA under this Consent Decree, upon consultation with the Settling Defendants,

the approved or modified portion shall be enforceable under this Consent Decree.

XIII. PROJECT COORDINATORS

42. Within 20 days of lodging this Consent Decree, the Settling Defendants and EPA will notify each other, in writing, of the name, address and telephone number of their respective designated Project Coordinators and Alternate Project Coordinators. If a Project Coordinator or Alternate Project Coordinator initially designated is changed, the identity of the successor will be given to the other parties at least 5 working days before the changes occur, unless impracticable, but in no event later than the actual day the change is made. The Settling Defendants' Project Coordinator shall be subject to disapproval by EPA and shall have the technical expertise sufficient to adequately oversee all aspects of the Work. The Settling Defendants' Project Coordinator shall not be an attorney for any of the Settling Defendants in this matter. He or she may assign other representatives, including other contractors, to serve as a Site representative for oversight of performance of daily operations during remedial activities.

43. Subject to the provisions of Paragraph 19 hereof, Plaintiff may designate other representatives consisting of EPA and State employees, to observe and monitor the progress of any activity undertaken pursuant to this Consent Decree. EPA's Project Coordinator and Alternate Project Coordinator shall have the authority lawfully vested in a Remedial Project Manager (RPM)

and an On-Scene Coordinator (OSC) by the National Contingency Plan, 40 C.F.R. Part 300. In addition, EPA's Project Coordinator or Alternate Project Coordinator shall have authority, consistent with the National Contingency Plan, to halt any Work required by this Consent Decree and to take any necessary response action when he or she determines that conditions at the Site constitute an emergency situation or may present an immediate threat to public health or welfare or the environment due to release or threatened release of Waste Material.

XIV. ASSURANCE OF ABILITY TO COMPLETE WORK

44. Within 30 days of entry of this Consent Decree, the Settling Defendants shall establish and maintain financial security in an amount not less than the estimated cost for the O&M and PSVM in one of the following forms:

- (a) A surety bond guaranteeing performance of the Work;
  - (b) One or more irrevocable letters of credit equalling the total estimated cost of the Work;
  - (c) A trust fund;
  - (d) A guarantee to perform the Work by one or more parent corporations or subsidiaries, or by one or more unrelated corporations that have a substantial business relationship with at least one of the Settling Defendants;
  - (e) A demonstration that one or more of the Settling Defendants satisfy the requirements of 40 C.F.R. Part 264.143(f);
- or

(f) internal financial information sufficient to allow EPA to determine that Settling Defendants had sufficient assets available to perform the Work. Subparagraph (f) is not subject to the Dispute Resolution provisions of Section XX of this Decree.

45. If the Settling Defendants seek to demonstrate the ability to complete the Work through a guarantee by a third party pursuant to Paragraph 45(d) of this Consent Decree, the Settling Defendants shall demonstrate that the guarantor satisfies the requirements of 40 C.F.R. Part 264.143(f). If the Settling Defendants seek to demonstrate their ability to complete the Work by means of the financial test or the corporate guarantee pursuant to Paragraph 45(d) or (e), they shall resubmit sworn statements conveying the information required by 40 C.F.R. Part 264.143(f) annually, on the anniversary of the effective date of this Consent Decree. If the Settling Defendants seek to demonstrate their ability to complete the Work by means of internal financial information, they must resubmit the information annually. In the event that EPA determines at any time that the financial assurances provided pursuant to this Section are inadequate, EPA shall notify the Settling Defendants of the basis of its determination. The Settling Defendants shall, within 30 days of receipt of notice of EPA's determination, obtain and present to EPA for approval one of the other forms of financial assurance listed in Paragraph 43 of this Consent Decree. The Settling Defendants' inability to

demonstrate financial ability to complete the Work shall not excuse performance of any activities required under this Consent Decree.

XV. CERTIFICATION OF COMPLETION OF THE WORK

46. Within 90 days after the Settling Defendants conclude that all phases of the Work have been fully performed, and all Performance Standards have been met, the Settling Defendants shall schedule and conduct a pre-certification inspection to be attended by the Settling Defendants, the State and EPA. If, after the pre-certification inspection, the Settling Defendants still believe that the Work has been fully performed, the Settling Defendants shall submit a written report by a registered professional engineer stating that the Work has been completed in full satisfaction of the requirements of this Consent Decree. The report shall contain the following statement, signed by a responsible corporate official of a Settling Defendant or the Settling Defendants' Project Coordinator:

"I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations."

If, after review of the written report, EPA, after a reasonable opportunity for review and comment by the State, determines that

any portion of the Work has not been completed in accordance with this Consent Decree, EPA will notify the Settling Defendants in writing of the activities that must be undertaken to complete the Work. EPA will set forth in the notice a schedule for performance of such activities consistent with the Consent Decree and the SOW or require the Settling Defendants to submit a schedule to EPA for approval pursuant to Section XII (Submissions Requiring Agency Approval). The Settling Defendants shall perform all activities described in the notice in accordance with the specifications and schedules established therein, subject to their right to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution).

47. If EPA concludes, based on the initial or any subsequent request for Certification of Completion by the Settling Defendants, and after a reasonable opportunity for review and comment by the State, that the Work has been fully performed in accordance with this Consent Decree, EPA will so notify the Settling Defendants in writing.

#### XVI. EMERGENCY RESPONSE

48. In the event of any action or occurrence during the performance of the Work which causes or threatens a release of Waste Material from the Site that constitutes an emergency situation or may present an immediate threat to public health or welfare or the environment, the Settling Defendants shall, subject to Paragraph 49, immediately take all appropriate action to prevent, abate, or minimize such release or threat of release,

and shall immediately notify the EPA's Project Coordinator, or, if the Project Coordinator is unavailable, EPA's Alternate Project Coordinator. If neither of these persons is available, the Settling Defendants shall notify the EPA Emergency Response Unit, Region IV Hotline at (404) 347-4062. The Settling Defendants shall take such actions in consultation with EPA's Project Coordinator or other available authorized EPA officer and in accordance with all applicable provisions of the Health and Safety Plans, the Contingency Plans, and any other applicable plans or documents developed pursuant to the SOW. In the event that the Settling Defendants fail to take appropriate response action as required by this Section, and EPA takes such action instead, the Settling Defendants shall reimburse EPA for all costs of the response action not inconsistent with the NCP pursuant to Section XVII (Reimbursement of Response Costs).

49. Nothing in the preceding Paragraph or in this Consent Decree shall be deemed to limit any authority of the United States to take, direct, or order all appropriate action or to seek an order from the Court to protect human health and the environment or to prevent, abate, respond to, or minimize an actual or threatened release of Waste Material on, at, or from the Site.

#### XVII. REIMBURSEMENT OF RESPONSE COSTS

50. Within 30 days of the effective date of this Consent Decree, the Settling Defendants shall pay to the United States \$3,951,083 in reimbursement of EPA's Past Response Costs, and

\$181,754.69 in reimbursement of DOJ's Past Response Costs for a total amount of \$4,132,837.69, by Electronic Funds Transfer ("EFT or wire transfer") to the U.S. Department of Justice lockbox bank, referencing U.S.A.O. file number \_\_\_\_\_, the EPA Region and Site/Spill ID # 0444 and DOJ case number 90-11-3-336. Payments shall be made in accordance with instructions provided by the Plaintiff to Settling Defendants upon execution of the Consent Decree. The Settling Defendants shall send a copy of the EFT transaction to the United States as specified in Section XXVII (Notices and Submissions). Payments by EFT must be received at the DOJ lockbox bank by 4:00 P.M. (Eastern Time) to be credited on that day.

51. (a) The Settling Defendants shall reimburse the United States for all Future Response Costs incurred by the United States not inconsistent with the Consent Decree or/and the National Contingency Plan. The United States will send the Settling Defendants a bill requiring payment that includes a Cost Summary which includes direct and indirect costs incurred by EPA and DOJ and their contractors on a periodic basis. The Settling Defendants shall make all payments within 30 days of the Settling Defendants' receipt of each bill requiring payment, or receipt of requested documentation as provided in Paragraph 51(b), except as otherwise provided in Paragraph 52. The Settling Defendants shall make all payments required by this Paragraph in the form of a certified check or checks made payable to "EPA Hazardous Substance Superfund" and referencing the EPA Region and

Site/Spill ID # 0444 and DOJ case number 90-11-3-336. The Settling Defendants shall forward the certified checks(s) to the United States Environmental Protection Agency, Region IV, Attention: Superfund Accounting, P.O. Box 100142, Atlanta, Georgia, 30384, and shall send copies of the check(s) to the United States as specified in Section XXVII (Notices and Submissions). EPA has approximated the amount of its future response costs incurred between August 31, 1994, and May 4, 1995, as \$74,139.34 (including EPA oversight and enforcement costs and payments to EPA contractors), based on uncertified data which is subject to change prior to receipt by the Settling Defendants of the bill for these response costs.

51. (b) Within 60 days of receipt of the Settling Defendants' request for additional cost documentation, EPA shall provide an uncertified summary of the hours charged for United States personnel and the cost charged for such time. If the Settling Defendants have a dispute with respect to the cost figures contained in the uncertified summary submitted by EPA, the Settling Defendants shall request that EPA provide a certified summary prior to proceeding with any judicial resolution of a dispute pursuant to Section XX (Dispute Resolution). For costs incurred through a contract with a non-governmental entity in connection with the Site, EPA shall also provide work performed documentation consisting of periodic technical progress reports (e.g. Technical Status Reports) or, in the event such documents are not prepared and issued to EPA by the contractor, such other

documents that describe generally the work performed by the contractor in connection with the Site for the relevant reporting period and the associated costs. If required by the nature of the contractor information, confidential information may be protected under the provisions of 40 C.F.R. 300, Part 2, Subpart B, 58 Fed. Reg. 458, January 5, 1993.

52. The Settling Defendants may contest payment of any Future Response Costs under Paragraph 51(a) if they determine that the United States has made an accounting error or if they allege that a cost item that is included represents costs that are inconsistent with this Consent Decree or with the NCP. Such objection shall be made in writing within 30 days of receipt of the bill and must be sent to the United States pursuant to Section XXVII (Notices and Submissions). Any such objection shall specifically identify the contested Future Response Costs and the basis for objection. In the event of an objection, the Settling Defendants shall within the 30 day period pay all uncontested Future Response Costs to the United States in the manner described in Paragraph 51(a). Simultaneously, the Settling Defendants shall establish an interest bearing escrow account in a federally-insured bank duly chartered in the State of Tennessee, and remit to that escrow account funds equivalent to the amount of the contested Future Response Costs. The Settling Defendants shall send to the United States, as provided in Section XXVII (Notices and Submissions), a copy of the transmittal letter and check paying the uncontested Future

Response Costs, and a copy of the correspondence that establishes and funds the escrow account, including, but not limited to, information containing the identity of the bank and bank account under which the escrow account is established as well as a bank statement showing the initial balance of the escrow account. Simultaneously with establishment of the escrow account, the Settling Defendants shall initiate the Dispute Resolution procedures in Section XX (Dispute Resolution). If the United States prevails in the dispute, within 5 days of the resolution of the dispute, the Settling Defendants shall pay the sums due (with accrued interest) to the United States in the manner described in Paragraph 51(a). If the Settling Defendants prevail concerning any aspect of the contested costs, the Settling Defendants shall pay that portion of the costs (plus associated accrued interest) for which they did not prevail to the United States in the manner described in Paragraph 51(a); the Settling Defendants shall be disbursed any balance of the escrow account. The dispute resolution procedures set forth in this Paragraph in conjunction with the procedures set forth in Section XX (Dispute Resolution) shall be the exclusive mechanisms for resolving disputes regarding the Settling Defendants' obligation to reimburse the United States for its Future Response Costs.

53. In the event that the payments required by Paragraph 50 are not made within 40 days of the effective date of this Consent Decree or the payments required by Paragraph 51(a) are not made within 40 days of the Settling Defendants' receipt of the bill,

or receipt of requested documentation as provided in Paragraph 51(b), the Settling Defendants shall pay interest on the unpaid balance at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607. The interest on Future Response Costs shall begin to accrue 30 days following the Settling Defendants' receipt of the bill. Interest shall accrue at the rate specified through the date of the Settling Defendant's payment. Payments of interest made under this Paragraph shall be in addition to such other remedies or sanctions available to Plaintiffs by virtue of the Settling Defendants' failure to make timely payments under this Section.

#### XVIII. INDEMNIFICATION AND INSURANCE

54. The United States do not assume any liability by entering into this agreement or by virtue of any designation of the Settling Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. The Settling Defendants shall hereby indemnify, save and hold harmless the United States and its officials, agents, employees, contractors, subcontractors, or representatives for or from any and all claims or causes of action arising from, or on account of, acts or omissions of the Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree, including, but not limited to, any claims arising from any designation of the Settling

Defendants as EPA's authorized representatives under Section 104(e) of CERCLA. Further, the Settling Defendants agree to pay the United States all costs it incurs including, but not limited to, attorneys fees and other expenses of litigation and settlement arising from, or on account of, claims made against the United States based on acts or omissions of the Settling Defendants, their officers, directors, employees, agents, contractors, subcontractors, and any persons acting on their behalf or under their control, in carrying out activities pursuant to this Consent Decree. The United States shall not be held out as a party to any contract entered into by or on behalf of the Settling Defendants in carrying out activities pursuant to this Consent Decree. Neither the Settling Defendants nor any such contractor shall be considered an agent of the United States.

55. The Settling Defendants waive all claims against the United States for damages or reimbursement or for set-off of any payments made or to be made to the United States arising from or on account of any contract, agreement, or arrangement between any one or more of the Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. In addition, the Settling Defendants shall indemnify and hold harmless the United States with respect to any and all claims for damages or reimbursement arising from or on account of any contract, agreement, or arrangement between any one or more of

the Settling Defendants and any person for performance of Work on or relating to the Site, including, but not limited to, claims on account of construction delays. Nothing in this Consent Decree, however, shall require indemnification by the Settling Defendants with respect to any claim or cause of action against the United States based upon negligent actions taken solely and directly by the United States, not including oversight or approval of the Settling Defendants plans or activities, unless the action by the United States was based on information provided by the Settling Defendants and relied upon by the United States.

56. No later than 15 days after the effective date of this Consent Decree, the Settling Defendants shall secure, and shall maintain until the first anniversary of EPA's Certification of Completion of the Work pursuant to Paragraph 47 of Section XV (Certification of Completion) comprehensive general liability insurance with limits of two (2) million dollars, combined single limit naming as an additional insured the United States. In addition, for the duration of this Consent Decree, the Settling Defendants shall satisfy, or shall ensure that their contractors or subcontractors satisfy, all applicable laws and regulations regarding the provision of worker's compensation insurance for all persons performing the Work on behalf of the Settling Defendants in furtherance of this Consent Decree. Prior to commencement of the Work under this Consent Decree, the Settling Defendants shall provide to EPA certificates of such insurance

and make available a copy of each insurance policy. The Settling Defendants shall resubmit such certificates and shall make available copies of policies each year on the anniversary of the effective date of this Consent Decree, and shall annually provide a certification that the policy terms pertaining to any environmental liability relating to the Site, either remain unchanged, or if they are changed, the Settling Defendants shall include in the certification a description of the changes. If the Settling Defendants demonstrate by evidence satisfactory to EPA that any contractor or subcontractor maintains insurance equivalent to that described above, or insurance covering the same risks but in a lesser amount, then, with respect to matters so insured by that contractor or subcontractor, the Settling Defendants need provide only that portion of the insurance described above which is not maintained by the contractor or subcontractor. All certificates, policies, and certifications provided to EPA by the Settling Defendants shall be considered confidential business information, and shall not be disseminated outside EPA without the express written consent of all Settling Defendants.

#### XIX. FORCE MAJEURE

57. "Force majeure," for purposes of this Consent Decree, is defined as any event arising from causes beyond the control of the Settling Defendants or of any entity controlled by the Settling Defendants, including, but not limited to, their contractors and subcontractors, that delays or prevents the

performance of any obligation under this Consent Decree despite the Settling Defendants' best efforts to fulfill the obligation. The requirement that the Settling Defendants exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event (1) as it is occurring and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. "Force Majeure" does not include financial inability to complete the Work, any failure to attain the Performance Standards, or increased costs.

58. If any event occurs or has occurred that may delay the performance of any obligation under this Consent Decree, whether or not caused by a force majeure event, the Settling Defendants shall notify orally EPA's Project Coordinator or, in his or her absence, EPA's Alternate Project Coordinator or, in the event both of EPA's designated representatives are unavailable, Joseph R. Franzmathes, the Director of the Hazardous Waste Management Division, (404) 347-3454, EPA Region IV, within two working days of when the Settling Defendants first knew or should have known that the event might cause a delay. Within 7 days thereafter, the Settling Defendants shall provide in writing to EPA an explanation and description of the reasons for the delay; the obligations and deadlines Settling Defendants claim are affected by the delay; the anticipated duration of the delay; all actions taken or to be taken to prevent or minimize the delay; a schedule

for implementation of any measures to be taken to prevent or mitigate the delay or the effect of the delay; the Settling Defendants' rationale for attributing such delay to a force majeure event if they intend to assert such a claim; and a statement as to whether, in the opinion of the Settling Defendants, such event may cause or contribute to an endangerment to public health, welfare or the environment. The Settling Defendants shall include with any notice all available documentation supporting their claim that the delay was attributable to a force majeure. Failure to comply with the above requirements shall preclude the Settling Defendants from asserting any claim of force majeure for that event. The Settling Defendants shall be deemed to have notice of any circumstance of which their contractors or subcontractors had or should have had notice.

59. If EPA agrees that the delay or anticipated delay is attributable to a force majeure event, the time for performance of the obligations under this Consent Decree that are affected by the force majeure event will be extended by EPA for such time as is necessary to complete those obligations. An extension of the time for performance of the obligations affected by the force majeure event shall not, of itself, extend the time for performance of any other obligation. If EPA does not agree that the delay or anticipated delay has been or will be caused by a force majeure event, EPA will notify the Settling Defendants in writing of its decision. If EPA agrees that the delay is

attributable to a force majeure event, EPA will notify the Settling Defendants in writing of the length of the extension, if any, for performance of the obligations affected by the force majeure event.

60. If the Settling Defendants elect to invoke the dispute resolution procedures set forth in Section XX (Dispute Resolution), they shall do so no later than 15 days after receipt of EPA's notice. In any such proceeding, the Settling Defendants shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure event, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that best efforts were exercised to avoid and mitigate the effects of the delay, and that the Settling Defendants complied with the requirements of Paragraphs 57 and 58, above. If the Settling Defendants carry this burden, the delay at issue shall be deemed not to be a violation by the Settling Defendants of the affected obligation of this Consent Decree identified to EPA and the Court.

#### XX. DISPUTE RESOLUTION

61. Unless otherwise expressly provided for in this Consent Decree, the dispute resolution procedures of this Section shall be the exclusive mechanism to resolve disputes arising under or with respect to this Consent Decree. However, the procedures set forth in this Section shall not apply to actions by the United

States to enforce obligations of the Settling Defendants that have not been disputed in accordance with this Section.

62. Any dispute which arises under or with respect to this Consent Decree shall in the first instance be the subject of informal negotiations between the parties to the dispute. The period for informal negotiations shall not exceed 20 days from the time the dispute arises, unless it is modified by written agreement of the parties to the dispute. The dispute shall be considered to have arisen when one party sends the other parties a written Notice of Dispute.

63. a. In the event that the parties cannot resolve a dispute by informal negotiations under the preceding Paragraph, then the position advanced by EPA shall be considered binding unless, within 10 days after the conclusion of the informal negotiation period, the Settling Defendants invoke the formal dispute resolution procedures of this Section by serving on the U.S. EPA Region IV a written Statement of Position on the matter in dispute, including, but not limited to, any factual data, analysis or opinion supporting that position and any supporting documentation relied upon by the Settling Defendants. The Statement of Position shall specify the Settling Defendants' position as to whether formal dispute resolution should proceed under paragraphs 64 or 65.

b. Within fourteen (14) days after receipt of the Settling Defendants' Statement of Position, EPA Region IV will serve on the Settling Defendants its Statement of Position,

including, but not limited to, any factual data, analysis, or opinion supporting that position and all supporting documentation relied upon by EPA. EPA's Statement of Position shall include a statement as to whether formal dispute resolution should proceed under paragraphs 64 or 65.

c. If there is disagreement between EPA and the Settling Defendants as to whether dispute resolution should proceed under Paragraph 64 or 65, the parties to the dispute shall follow the procedures set forth in the paragraph determined by EPA to be applicable. However, if the Settling Defendants ultimately appeal to the court to resolve the dispute, the Court shall determine which paragraph is applicable in accordance with the standards of applicability set forth in paragraphs 64 and 65.

64. Formal dispute resolution for disputes pertaining to the selection or adequacy of any response action and all other disputes that are accorded review on the administrative record under applicable principles of administrative law shall be conducted pursuant to the procedures set forth in this Paragraph. For purposes of this Paragraph, the adequacy of any response action includes, without limitation: (1) the adequacy or appropriateness of plans, procedures to implement plans, or any other items requiring approval by EPA under this Consent Decree; and (2) the adequacy of the performance of response actions taken pursuant to this Consent Decree. Nothing in this Consent Decree shall be construed to allow any dispute by the Settling Defendants regarding the validity of the ROD's provisions.

a. An administrative record of the dispute shall be maintained by EPA and shall contain all statements of position, including supporting documentation, submitted pursuant to this Paragraph. Where appropriate, EPA may allow submission of supplemental statements of position by the parties to the dispute.

b. The Director of the Waste Management Division, EPA Region IV, will issue a final administrative decision resolving the dispute based on the administrative record described in Paragraph 64.a. This decision shall be binding upon the Settling Defendants, subject only to the right to seek judicial review pursuant to Paragraph 64.c. and d.

c. Any administrative decision made by EPA pursuant to paragraph 64.b. shall be reviewable by this Court, provided that a notice of judicial appeal is filed by the Settling Defendants with the Court and served on all Parties within 10 days of receipt of EPA's decision. The notice of judicial appeal shall include a description of the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of this Consent Decree. The United States may file a response to the Settling Defendants' notice of judicial appeal.

d. In proceedings on any dispute governed by this Paragraph, the Settling Defendants shall have the burden of demonstrating that the decision of the Waste Management Division

Director is arbitrary and capricious or otherwise not in accordance with law. Judicial review of EPA's decision shall be on the administrative record compiled pursuant to Paragraphs 64.a.

65. Formal dispute resolution for disputes that neither pertain to the selection or adequacy of any response action nor are otherwise accorded review on the administrative record under applicable principles of administrative law, shall be governed by this Paragraph.

a. Following receipt of the Settling Defendants' Statement of Position submitted pursuant to Paragraph 63(a), the Director of the Waste Management Division, EPA Region IV, will issue a final decision resolving the dispute. The Waste Management Division Director's decision shall be binding on the Settling Defendants unless, within 10 days of receipt of the decision, the Settling Defendants file with the Court and serve on the parties a notice of judicial appeal setting forth the matter in dispute, the efforts made by the parties to resolve it, the relief requested, and the schedule, if any, within which the dispute must be resolved to ensure orderly implementation of the Consent Decree. The United States may file a response to the Settling Defendants' notice of judicial appeal.

b. Notwithstanding Paragraph K of Section I (Background) of this Consent Decree, judicial review of any dispute governed by this Paragraph shall be governed by applicable provisions of law.

66. The invocation of formal dispute resolution procedures under this Section shall not extend, postpone or affect in any way any obligation of the Settling Defendants under this Consent Decree not directly in dispute, unless EPA or the Court agrees otherwise. Stipulated penalties with respect to the disputed matter shall continue to accrue but payment shall be stayed pending resolution of the dispute as provided in Paragraph 74. Notwithstanding the stay of payment, stipulated penalties shall accrue from the first day of noncompliance with any applicable provision of this Consent Decree. In the event that the Settling Defendant does not prevail on the disputed issue, stipulated penalties shall be assessed and paid as provided in Section XXI (Stipulated Penalties).

**XXI. STIPULATED PENALTIES**

67. The Settling Defendants shall be liable for stipulated penalties in the amounts set forth in Paragraphs 68 and 69 to the United States for failure to comply with the requirements of this Consent Decree specified below, unless excused under Section XIX (Force Majeure). "Compliance" by the Settling Defendants shall include completion of the activities under this Consent Decree or any work plan or other plan approved under this Consent Decree identified below in accordance with all applicable requirements of law, this Consent Decree, the SOW, and any plans or other documents approved by EPA pursuant to this Consent Decree and within the specified time schedules established by and approved under this Consent Decree.

68. a. The following stipulated penalties shall be payable per violation per day to the United States for any noncompliance identified in Subparagraph b:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$1,250	1st thru 14th day
\$2,500	15th thru 30th day
\$3,750	31st thru 45th day
\$7,000	46th day and beyond

b. Failure to timely or adequately comply with the following requirements of this Consent Decree:

1. Submittal and, if necessary, modification of any preliminary and final O&M Design Plan, including but not limited to, the Technical Memorandum and the System Optimization Report;

2. Submittal and, if necessary, modification of any preliminary and final O&M Implementation Plan, including but not limited to PSVM plan and the O&M Plan and manual;

3. Submittal and, if necessary, modification of any significant deliverables as identified in the EPA approved O&M Design and O&M Implementation Plans;

4. Completion of the O&M required under this Consent Decree;

5. Establishment of financial assurance pursuant to Section XIV of this Decree;

6. Procurement of insurance;

7. Hiring Supervising Contractor;

8. Submittal and, if necessary, modification of any work plan(s) for further response actions and additional work pursuant to Sections XI and XII, hereof;

9. Payment of Past Response Costs pursuant to Section XVII. (Reimbursement of Response Costs); and

10. Implementation of further response actions and additional work pursuant to Section VII, hereof.

69. The following stipulated penalties shall be payable per violation per day to the United States for failure to submit timely or adequate reports or other written documents pursuant to Paragraph 30:

<u>Penalty Per Violation Per Day</u>	<u>Period of Noncompliance</u>
\$500	1st thru 14th day
\$1,000	15th thru 30th day
\$2,000	31st thru 45th day
\$3,000	46th day and beyond

70. All penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs, and shall continue to accrue through the final day of the correction of the noncompliance or completion of the activity. Nothing herein shall prevent the simultaneous accrual of separate penalties for separate violations of this Consent Decree.

71. Following EPA's determination that the Settling Defendants have failed to comply with a requirement of this Consent Decree, EPA may give the Settling Defendants written notification of the same and describe the noncompliance. EPA may send the Settling

Defendants a written demand for the payment of the penalties. However, penalties shall accrue as provided in the preceding Paragraph regardless of whether EPA has notified the Settling Defendants of a violation.

72. All penalties owed to the United States under this section shall be due and payable within 30 days of the Settling Defendants' receipt from EPA of a demand for payment of the penalties, unless the Settling Defendants invoke the dispute resolution procedures under Section XX (Dispute Resolution). All payments under this Section shall be paid by certified check made payable to "EPA Hazardous Substances Superfund," shall be mailed to United States Environmental Protection Agency, Region IV, Attention: Superfund Accounting, P.O. Box 100141, Atlanta, Georgia, 30384, and shall reference the EPA Region and Site/Spill ID # 0444 and DOJ Case Number 90-11-3-336. Copies of check(s) paid pursuant to this Section, and any accompanying transmittal letter(s), shall be sent to the United States as provided in Section XXVI (Notices and Submissions).

73. The payment of penalties shall not alter in any way the Settling Defendants' obligation to complete the performance of the Work required under this Consent Decree.

74. Penalties shall continue to accrue as provided in Paragraph 70 during any dispute resolution period, but need not be paid until the following:

a. If the dispute is resolved by agreement or by a decision of EPA that is not appealed to this Court, accrued

penalties determined to be owing shall be paid to EPA within 15 days of the agreement or the receipt of EPA's decision or order;

b. If the dispute is appealed to this Court and the United States prevails in whole or in part, the Settling Defendants shall pay all accrued penalties determined by the Court to be owed to EPA within 60 days of receipt of the Court's decision or order, except as provided in Subparagraph c below;

c. If the District Court's decision is appealed by any Party, the Settling Defendants shall pay all accrued penalties determined by the District Court to be owing to the United States into an interest-bearing escrow account within 60 days of receipt of the Court's decision or order. Penalties shall be paid into this account as they continue to accrue, at least every 60 days. Within 15 days of receipt of the final appellate court decision, the escrow agent shall pay the balance of the account to EPA or to the Settling Defendants to the extent that they prevail.

75. a. If the Settling Defendants fail to pay stipulated penalties when due, the United States may institute proceedings to collect the penalties, as well as interest. The Settling Defendants shall pay interest on the unpaid balance, which shall begin to accrue on the date of demand made pursuant to Paragraph 72 at the rate established pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607.

b. Nothing in this Consent Decree shall be construed as prohibiting, altering, or in any way limiting the ability of the United States to seek any other remedies or sanctions available

by virtue of the Settling Defendants' violation of this Decree or of the statutes and regulations upon which it is based, including, but not limited to, penalties pursuant to Section 122(1) of CERCLA.

XXII. COVENANTS NOT TO SUE BY PLAINTIFFS

76. In consideration of the actions that will be performed and the payments that will be made by the Settling Defendants under the terms of the Consent Decree, and except as specifically provided in Paragraphs 77, 78, and 80 of this Section, the United States covenants not to sue or to take administrative action against the Settling Defendants relating to the Site, pursuant to Sections 106 and 107(a) of CERCLA. However, this covenant shall not be read to preclude the ability of the United States to defend the counter claim in this action. Except with respect to future liability, these covenants not to sue shall take effect upon the receipt by EPA of the payments required by Paragraph 50 of Section XVII (Reimbursement of Response Costs). With respect to future liability, these covenants not to sue shall take effect upon Certification of Completion of Remedial Action by EPA pursuant to Paragraph 47 of Section XV (Certification of Completion). These covenants not to sue are conditioned upon the complete and satisfactory performance by the Settling Defendants of their obligations under this Consent Decree. These covenants not to sue extend only to the Settling Defendants and do not extend to any other person.

77. United States' Pre-certification reservations.

Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel the Settling Defendants (1) to perform further response actions relating to the Site or (2) to reimburse the United States for additional costs of response if, prior to Certification of Completion of the Work:

(i) conditions at the Site, previously unknown to EPA, are discovered, or

(ii) information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or information together with any other relevant information indicate that the performed Work is not protective of human health or the environment.

78. United States' Post-certification reservations.

Notwithstanding any other provision of this Consent Decree, the United States reserves, and this Consent Decree is without prejudice to, the right to institute proceedings in this action or in a new action, or to issue an administrative order seeking to compel the Settling Defendants (1) to perform further response actions relating to the Site or (2) to reimburse the United States for additional costs of response if, subsequent to Certification of Completion of the Work:

- (i) conditions at the Site, previously unknown to EPA, are discovered, or
- (ii) information, previously unknown to EPA, is received, in whole or in part,

and these previously unknown conditions or this information together with other relevant information indicate that the Remedial Action is not protective of human health or the environment.

79. For purposes of Paragraph 77, the information and the conditions known to EPA shall include only that information and those conditions set forth in the Record of Decision for the Site, the administrative record supporting the Record of Decision, the ESD submitted on July 1991, the Supplemental Site Investigation Report submitted November 21, 1994, and the information received by EPA reflecting sampling of the groundwater treatment system conducted during Phase I of O&M between August 19, 1992, and June 10, 1993, and Phase II of O&M between July 11, 1993 and June 9, 1994, which sampling activities are summarized in the Phase I and Phase II Evaluation Report attached to this Decree as Appendix F. For purposes of Paragraph 78, the information and the conditions known to EPA shall include only the information and those conditions as set forth above, and any information received by EPA pursuant to the requirements of this Consent Decree and/or by its predecessor UAO prior to Certification of Completion of the Work.

80. General reservations of rights. The covenants not to sue set forth above do not pertain to any matters other than those expressly specified in Paragraph 76. The United States reserves, and this Consent Decree is without prejudice to, all rights against the Settling Defendants with respect to all other matters, including but not limited to, the following:

- (1) claims based on a failure by the Settling Defendants to meet a requirement of this Consent Decree;
- (2) liability arising from the past, present, or future disposal, release, or threat of release of Waste Materials outside of the Site;
- (3) liability for damages for injury to, destruction of, or loss of natural resources;
- (4) liability for response costs that have been or may be incurred by any federal agency which is a trustee for natural resources and which has, or may in the future, spend funds relating to the Site;
- (5) criminal liability;
- (6) liability for violations of federal or state law which occur during or after implementation of the Remedial Action.

81. In the event EPA determines that the Settling Defendants have failed to implement any provision(s) of the Work in an adequate or timely manner, EPA may perform any and all portions of the Work as EPA determines necessary. The Settling Defendants may invoke the procedures set forth in Section XX (Dispute

Resolution) to dispute EPA's determination that the Settling Defendants failed to implement a provision of the Work in an adequate or timely manner as arbitrary and capricious or otherwise not in accordance with law. Such dispute shall be resolved on the administrative record. Costs incurred by the United States in performing the Work pursuant to this Paragraph shall be considered Future Response Costs that the Settling Defendants shall pay pursuant to Section XVII (Reimbursement of Response Costs).

82. Notwithstanding any other provision of this Consent Decree, the United States retains all authority and reserves all rights to take any and all response actions authorized by law.

**XXIII. COVENANTS BY SETTLING DEFENDANTS**

83. The Settling Defendants hereby covenant not to sue and agree not to assert any claims or causes of action against the United States with respect to the Site or this Consent Decree, including, but not limited to, any direct or indirect claim for reimbursement from the Hazardous Substance Superfund (established pursuant to the Internal Revenue Code, 26 U.S.C. § 9507) through CERCLA Sections 106(b)(2), 111, 112, 113 or any other provision of law, any claim against the United States, under CERCLA Sections 107 or 113 related to the Site, except for the counterclaim presently asserted by the Settling Defendants against the United States in this civil action, to the extent the United States may have any liability pursuant to the counterclaim, or any claims arising out of response activities at

the Site, including any claims asserted against the United States' contractors. However, the Settling Defendants reserve, and this Consent Decree is without prejudice to, actions against the United States, or its contractors, based on any future negligent actions taken directly by the United States (not including oversight or approval of the Settling Defendants plans or activities) that are brought pursuant to any statute other than CERCLA and for which the waiver of sovereign immunity is found in a statute other than CERCLA. Nothing in this Consent Decree shall be deemed to constitute preauthorization of a claim within the meaning of Section 111 of CERCLA, 42 U.S.C. § 9611, or 40 C.F.R. § 300.700(d).

**XXIV. EFFECT OF SETTLEMENT; CONTRIBUTION PROTECTION**

84. Nothing in this Consent Decree shall be construed to create any rights in, or grant any cause of action to, any person not a party to this Consent Decree. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this decree may have under applicable law. Each of the Parties expressly reserves any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each party may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

85. With regard to claims for contribution against the Settling Defendants for matters addressed in this Consent Decree,

the Parties hereto agree that the Settling Defendants are entitled to such protection from contribution actions or claims as is provided by CERCLA Section 113(f)(2), 42 U.S.C. § 9613(f)(2).

86. The Settling Defendants agree that with respect to any suit or claim for contribution brought by them for matters related to this Consent Decree they will notify the United States in writing no later than 60 days prior to the initiation of such suit or claim.

87. The Settling Defendants also agree that with respect to any suit or claim for contribution brought against them for matters related to this Consent Decree they will notify in writing the United States within 10 days of service of the complaint on them. In addition, the Settling Defendants shall notify the United States within 10 days of service or receipt of any Motion for Summary Judgment and within 10 days of receipt of any order from a court setting a case for trial.

88. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive relief, recovery of response costs, or other appropriate relief relating to the Site, the Settling Defendants shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been brought in the instant case; provided, however,

that nothing in this Paragraph affects the enforceability of the covenants not to sue set forth in Section XXII (Covenants Not to Sue by Plaintiffs).

**XXV. ACCESS TO INFORMATION**

89. Subject to the provisions of Paragraph 90(b), the Settling Defendants shall provide to EPA, upon request, copies of all documents and information within their possession or control or that of their contractors or agents relating to activities at the Site or to the implementation of this Consent Decree, including, but not limited to, sampling, analysis, chain of custody records, manifests, trucking logs, receipts, reports, sample traffic routing, correspondence, or other documents or information related to the Work. The Settling Defendants shall also make available to EPA, for purposes of investigation, information gathering, or testimony, their employees, agents, or representatives with knowledge of relevant facts concerning the performance of the Work.

90. a. The Settling Defendants may assert business confidentiality claims covering part or all of the documents or information submitted to Plaintiffs under this Consent Decree to the extent permitted by and in accordance with Section 104(e)(7) of CERCLA, 42 U.S.C. § 9604(e)(7), and 40 C.F.R. § 2.203(b). Documents or information determined to be confidential by EPA will be afforded the protection specified in 40 C.F.R. Part 2, Subpart B. If no claim of confidentiality accompanies documents or information when they are submitted to EPA, or if EPA has

notified the Settling Defendants that the documents or information are not confidential under the standards of Section 104(e)(7) of CERCLA, the public may be given access to such documents or information without further notice to the Settling Defendants.

b. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege in lieu of providing documents, they shall provide the Plaintiffs with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the contents of the document, record, or information; and (6) the privilege asserted by the Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

91. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeologic, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

**XXVI. RETENTION OF RECORDS**

92. Until 10 years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 47 of Section XV (Certification of Completion of the Work), each Settling Defendant shall preserve and retain all records and documents now in its possession or control or which come into its possession or control that relate in any manner to the performance of the Work or liability of any person for response actions conducted and to be conducted at the Site, regardless of any corporate retention policy to the contrary. Until 10 years after the Settling Defendants' receipt of EPA's notification pursuant to Paragraph 47 of Section XV (Certification of Completion), the Settling Defendants shall also instruct their contractors and agents to preserve all documents, records, and information of whatever kind, nature or description relating to the performance of the Work.

93. At the conclusion of this document retention period, the Settling Defendants shall notify the United States at least 90 days prior to the destruction of any such records or documents, and, upon request by the United States, the Settling Defendants shall deliver any such records or documents to EPA. The Settling Defendants may assert that certain documents, records and other information are privileged under the attorney-client privilege or any other privilege recognized by federal law. If the Settling Defendants assert such a privilege, they shall provide the Plaintiffs with the following: (1) the title of the document,

record, or information; (2) the date of the document, record, or information; (3) the name and title of the author of the document, record, or information; (4) the name and title of each addressee and recipient; (5) a description of the subject of the document, record, or information; and (6) the privilege asserted by the Settling Defendants. However, no documents, reports or other information created or generated pursuant to the requirements of the Consent Decree shall be withheld on the grounds that they are privileged.

94. Each Settling Defendant hereby certifies, individually, that it has not altered, mutilated, discarded, destroyed or otherwise disposed of any records, documents or other information relating to its potential liability regarding the Site since notification of potential liability by the United States or the State or the filing of suit against it regarding the Site and that it has fully complied with any and all EPA requests for information pursuant to Section 104(e) and 122(e) of CERCLA and Section 3007 of RCRA.

#### XXVII. NOTICES AND SUBMISSIONS

95. Whenever, under the terms of this Consent Decree, written notice is required to be given or a report or other document is required to be sent by one party to another, it shall be directed to the individuals at the addresses specified below, unless those individuals or their successors give notice of a change to the other parties in writing. All notices and submissions shall be considered effective upon receipt, unless otherwise provided.

Written notice as specified herein shall constitute complete satisfaction of any written notice requirement of the Consent Decree with respect to the United States, EPA, and the Settling Defendants, respectively.

As to the United States:

John C. Cruden  
Chief, Environmental Enforcement Section  
Environment and Natural Resources Division  
U.S. Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044  
Re: DJ # 90-11-3-336

and

Joseph R. Franzmathes  
Director, Waste Management Division  
United States Environmental Protection Agency  
Region IV

As to EPA:

Yvonne O. Jones  
EPA Regional Project Manager  
United States Environmental Protection Agency  
Region IV  
345 Courtland Street, N.E.  
Atlanta, GA 30365

As to the State:

Yanqing Mo  
State Project Coordinator  
Bureau of Solid and Hazardous Waste Management  
2600 Bull Street  
Columbia, South Carolina

As to the Settling Defendants:

Bennie Underwood  
DeMaximus, Inc.  
301 Gallaher View Road, Suite 227  
Knoxville, TN 37919

**XXVIII. EFFECTIVE DATE**

96. The effective date of this Consent Decree shall be the date upon which this Consent Decree is entered by the Court.

**XXIX. RETENTION OF JURISDICTION**

97. This Court retains jurisdiction over both the subject matter of this Consent Decree and the Settling Defendants for the duration of the performance of the terms and provisions of this Consent Decree for the purpose of enabling any of the Parties to apply to the Court at any time for such further order, direction, and relief as may be necessary or appropriate for the construction or modification of this Consent Decree, or to effectuate or enforce compliance with its terms, or to resolve disputes in accordance with Section XX (Dispute Resolution) hereof.

**XXX. APPENDICES**

98. The following appendices are attached to and incorporated into this Consent Decree:

"Appendix A" is the ROD.

"Appendix B" is the SOW.

"Appendix C" is the description and/or map of the Site.

"Appendix D" is the complete list of the Settling Defendants.

"Appendix E" Explanation of Significant Differences

"Appendix F" Phase I and Phase II Evaluation Report

XXXI. COMMUNITY RELATIONS

99. The Settling Defendants shall propose to EPA their participation in the community relations plan to be developed by EPA. EPA will determine the appropriate role for the Settling Defendants under the Plan. The Settling Defendants shall also cooperate with EPA in providing information regarding the Work to the public. As requested by EPA, the Settling Defendants shall participate in the preparation of such information for dissemination to the public and in public meetings which may be held or sponsored by EPA to explain activities at or relating to the Site.

XXXII. MODIFICATION

100. No modifications shall be made to this Consent Decree without written notification to and written approval of the United States, the Settling Defendants, and the Court, except as provided below. Schedules for completion of the Work specified in the Consent Decree or documents approved pursuant to this Consent Decree may be modified by agreement of EPA and the Settling Defendants. All such modifications shall be made in writing.

101. No material modifications shall be made to the SOW without written notification to and written approval of the United States, the Settling Defendants, and the Court. Prior to providing its approval to any modification, the United States will provide the State with a reasonable opportunity to review

and comment on the proposed modification. Modifications to the SOW that do not materially alter that document may be made by written agreement between EPA, after providing the State with a reasonable opportunity to review and comment on the proposed modification, and the Settling Defendants.

102. Nothing in this Decree shall be deemed to alter the Court's power to enforce, supervise or approve modifications to this Consent Decree.

XXXIII. LODGING AND OPPORTUNITY FOR PUBLIC COMMENT

103. This Consent Decree shall be lodged with the Court for a period of not less than thirty (30) days for public notice and comment in accordance with Section 122(d)(2) of CERCLA, 42 U.S.C. § 9622(d)(2), and 28 C.F.R. § 50.7. The United States reserves the right to withdraw or withhold its consent if the comments regarding the Consent Decree disclose facts or considerations which indicate that the Consent Decree is inappropriate, improper, or inadequate. The Settling Defendants consent to the entry of this Consent Decree without further notice.

104. If for any reason the Court should decline to approve this Consent Decree in the form presented, this agreement is voidable at the sole discretion of any party and the terms of the agreement may not be used as evidence in any litigation between the Parties.

XXXIV. SIGNATORIES/SERVICE

105. Each undersigned representative of a Settling Defendant to this Consent Decree and the Assistant Attorney General for

Environment and Natural Resources of the Department of Justice certifies that he or she is fully authorized to enter into the terms and conditions of this Consent Decree and to execute and legally bind such party to this document.

106. Each Settling Defendant hereby agrees not to oppose entry of this Consent Decree by this Court or to challenge any provision of this Consent Decree unless the United States has notified the Settling Defendants in writing that it no longer supports entry of the Consent Decree.

107. Each Settling Defendant shall identify, on the attached signature page, the name, address and telephone number of an agent who is authorized to accept service of process by mail on behalf of that party with respect to all matters arising under or relating to this Consent Decree. The Settling Defendants hereby agree to accept service in that manner and to waive the formal service requirements set forth in Rule 4 of the Federal Rules of Civil Procedure and any applicable local rules of this Court, including, but not limited to, service of a summons.

SO ORDERED THIS \_\_\_\_\_ DAY OF \_\_\_\_\_, 19\_\_.

---

United States District Judge

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Monsanto Company, et al., Civil Action No. 3:92-0961-19 relating to the Dixiana Superfund Site.

FOR THE UNITED STATES OF AMERICA

---

LOIS J. SCHIFFER  
Acting Assistant Attorney General  
Environment and Natural Resources  
Division  
U.S. Department of Justice  
Washington, D.C. 20530

---

QUENTIN A. PAIR  
CHERYL L. SMOUT  
Trial Attorneys  
Environmental Enforcement Section  
Environment and Natural Resources  
Division  
U. S Department of Justice  
P.O. Box 7611  
Washington, D.C. 20044  
(202) 514-1999

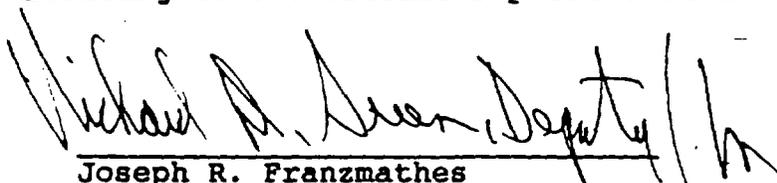
FOR:

United States Attorney for  
the District of South Carolina

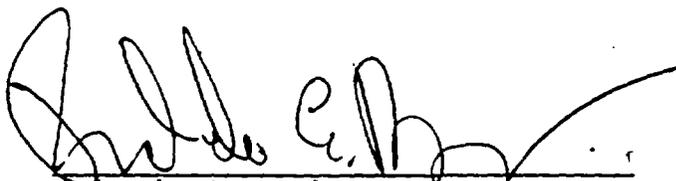
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Emery C. Clark

THE UNDERSIGNED PARTIES enter into this Consent Decree in the matter of United States v. Monsanto Company, et al., Civil Action No. 3:92-0961-19 relating to the Dixiana Superfund Site.



Joseph R. Franzmathes  
Director, Waste Management Division  
Region IV, U.S. Environmental Protection  
Agency  
345 Courtland Street, NE  
Atlanta, Georgia 30365



Rolando Bascumbe  
Assistant Regional Counsel  
U.S. Environmental Protection Agency  
Region IV  
345 Courtland Street, NE  
Atlanta, Georgia 30365

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Monsanto Company, et al., Civil Action No. 3:92-0961-19 relating to the Dixiana Superfund Site.

FOR MONSANTO COMPANY

Date: June 15, 1995

  
Name: Michael A. Pierle  
Title: Vice President, Monsanto Company  
Address: 800 North Lindbergh Blvd.  
St. Louis, MO 63167

*MR*  
*MR*

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name: Robert E. Stepp, Attorney at Law  
Title: Glenn Irvin Murphy Gray & Stepp, L.L.P.  
Address: 1901 Assembly St., Suite 390  
P.O. Box 1550  
Columbia, SC 29202-1550  
Telephone Number: 803/765-1100

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Monsanto Company, et al., Civil Action No. 3:92-0961-19 relating to the Dixiana Superfund Site.

FOR AT&T CORP.

Date: 06/22/95

Judy F. Dixon-Killian For  
Name: R. J. Femenella  
Title: Corp. Environmental Operations Strategy Director  
Address: AT&T, 131 Morrisstown Road  
Basking Ridge NJ 07920

Agent Authorized to Accept Service on Behalf of Above-signed Party:

Name:  
Title:  
Address:

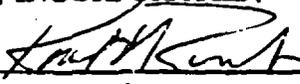
Telephone Number:

THE UNDERSIGNED PARTY enters into this Consent Decree in the matter of United States v. Monsanto Company, et al., Civil Action No. 3:92-0961-19 relating to the Dixiana Superfund Site.

**FOR THERM-O-DISC, INCORPORATED.**

Date:

June 13, 1995

  
Name: Karl E. Roesler  
Title: Senior Vice President - Finance  
Address: Therm-O-Disc, Inc.  
1320 S. Main St.  
Mansfield, OH 44907

**Agent Authorized to Accept Service on Behalf of Above-signed Party:**

Name: Robert E. Stepp  
Title: Counsel for Defendant Therm-O-Disc, Incorporated  
Address: Glenn Irvin Murphy Gray & Stepp, L.L.P.  
Southern National Building, Suite 390  
1901 Assembly Street  
Columbia, South Carolina 29202-1550  
Telephone Number: 803/765-1100

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
MODEL CERCLA RA/O&M CONSENT DECREE

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